United States Court of Appeals

for the Second Circuit

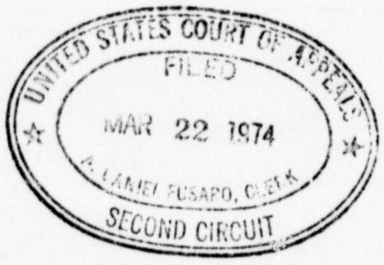
PETITIONER'S BRIEF

74-1283

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTINGHOUSE BROADCASTING COMPANY, INC., Petitioner,	)	B P/S
v.	)	Case No. 74-1283
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents,	)	
COLUMBIA BROADCASTING SYSTEM, INC. *et. al.* Intervenors.	)	

BRIEF FOR PETITIONER WESTINGHOUSE BROADCASTING COMPANY, INC.



JOHN D. LANE
J. CARTER MC KAIG
RAMSEY L. WOODWORTH

HEDRICK AND LANE
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Westinghouse Broadcasting Company, Inc.

March 21, 1974

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

ADMINISTRATIVE DECISIONS AND REPORTS

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Whether the Order of the Federal Communications Commission under review is supported by adequate findings as required by the Communications Act of 1934 and the Administrative Procedure Act.

2. Whether the Commission abused its discretion in promulgating rule revisions wholly inconsistent with the original purposes of the rule.

3. Whether, in view of its conclusion that it was impossible and unnecessary to make findings concerning the efficacy of the prime time access rule, the Commission acted capriciously in drastically altering the rule.

4. Whether the rule revisions promulgated by the Commission abridge fundamental First Amendment guarantees and constitute censorship prohibited by Section 326 of the Communications Act.

5. Whether the Commission violated the terms of its Notice of Rule Making and failed to provide appropriate notice of the modifications as required by the Administrative Procedure Act.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTINGHOUSE BROADCASTING COMPANY, INC., Petitioner	)	
v.	)	Case No. 74-1283
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents	)	
COLUMBIA BROADCASTING SYSTEM, INC., et al, Intervenors	)	

On A Petition to Review an Order of
the Federal Communications Commission

BRIEF FOR PETITIONER
WESTINGHOUSE BROADCASTING COMPANY, INC.

Statement of the Case

This proceeding involves a petition to review an order of the Federal Communications Commission (hereinafter "Commission") promulgating revised Section 73.658(k) of the Commission's Rules and Regulations, known as the "Evening Programming Requirements" Rule. Revised Section 73.658(k) was adopted by the Commission in its Report and Order in Docket No. 19622, FCC 74-80, released February 6, 1974. (J.A. 51-179) (hereinafter cited "Report and Order, ¶_____"). Effective September 1, 1974, the revised rule

supersedes former Section 73.658(k), the Prime Time Access Rule, adopted by the Commission in its Report and Order in Docket No. 12782, Network Television Broadcasting, 23 FCC 2d 382 (1970), as modified on reconsideration, Network Television Broadcasting, 25 FCC 2d 318 (1970). The promulgation of the Prime Time Access Rule was affirmed by this court in Mount Mansfield Television, Inc. v. F.C.C. 442 F.2d 470 (2nd Cir. 1971). */

As enacted in 1970, Section 73.658(k) provided that television licensees operating in the 50 largest television markets, in which there are three or more commercial television stations, shall not broadcast more than three hours of network programming during the prime time hours of 7:00-11:00 p.m. (local time) each evening. **/ The rule further provided that, after October 1, 1972, programs previously exhibited by a network (off-network programs) and feature films broadcast within the previous two years by a station in the market could not be broadcast during the excluded prime time hour.

---

*/ Westinghouse Broadcasting Company, Inc. (hereinafter "Group W") is licensed to operate television stations in Baltimore, Boston, Philadelphia, Pittsburgh, and San Francisco. The Boston and Philadelphia stations are affiliated with NBC; the Pittsburgh and San Francisco stations are affiliated with CBS; and the Baltimore station is an ABC affiliate.

**/ Except in the Central Time Zone where the relevant period is 6:00 to 10:00 p.m. Certain network-offered programs were excluded from the definition of "network programs": special news programs dealing with fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates for public office.

As characterized by the Commission, revised Section 73.658(k) (attached hereto as Appendix A) provides in substance as follows:

> "(a) There are no more restrictions on the programs which stations subject to the rule (network outlets in the top 50 markets) may carry during what is now the first half-hour of prime time (7-730 p.m. E.T. and P.T., 6-6:30 p.m. C.T. and M.T.).
>
> "(b) The only other restrictions are as to the second-half hour of what is now the access period (7:30-8 p.m. E.T. and P.T., 6:30-7 p.m. C.T. and M.T.), Monday through Saturday. Stations subject to the rule must devote at least 5 of these half-hours to material which is not network, off-network or feature film, and must devote a sixth half-hour to such use unless it is devoted to network or off-network programs which are children's "specials" or documentary or public affairs programs (the latter are defined as any program which is non-fictional and educational or informational, but not including programs where the information is used basically as part of a contest among participants).
>
> "(c) Although not stated in the rule, it is expected that some of the five or six half-hours "cleared" of network, off-network and feature film material will be used by stations for programs relating to minority affairs, children's programs, or other programs directed to the needs and problems of the station's community and coverage area, as disclosed in its ascertainment process.
>
> "(d) The new rule also contains provisions relating to time-zone differences, and sports "runovers" to the small extent necessary now that there are no restrictions on the 7-7:30 p.m. period. It is also stated that the Commission will be much more stringent with respect to some types of waivers than it has been up to now." (Report and Order, ¶3).

A. Events Leading to the Adoption of the Access Rule in 1970*/

The prime time access rule had its genesis in two proceedings instituted by the Commission in late 1950's. On February 26, 1959, the Commission initiated investigatory proceedings in Docket No. 12782 to "...determine the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices..." The Commission focused on the extent to which networks or others had achieved control of programming and the extent to which network ownership and control was desirable or necessary. Following extensive public hearings conducted in New York, Washington and Los Angeles, the Commission in June of 1960 received an Interim Report from its Office of Network Study concerning the licensee-affiliate relationship and the inability of licensees properly to exercise programming responsibility.**/ A second Interim Report (Part I) dealing with network program procurement practices was submitted on November 28, 1962, and this was later supple-

---

*/ This history is also summarized in Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d at 473-76. See also, Report and Order, ¶4-24.

**/ Interim Report, Responsibility for Broadcast Matter, June 15, 1960, reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. 197-494 (1963). This report served as the basis of the Commission's Report and Statement of Policy re: Commission En Banc Programming Inquiry, FCC 60-970, 20 Pike & Fischer R.R. 1901 (1960).

mented by Part II. */

On March 22, 1965, the Commission issued a Notice of Proposed Rule Making in Docket No. 12782. As a result of its investigative inquiry, the Commission tentatively found an undue concentration of control over television programming in the three networks. In addition to the rules which were proposed, the Commission invited alternative proposals which would alleviate the problems of undue concentration and restraint on licensee responsibility for programming.

Virtually concurrent with the commencement of this investigatory proceeding, on April 22, 1959, the Commission initiated rule-making proceedings in Docket No. 12859 to deal with the problems raised by television network "option time." This was the practice by which the networks required stations to broadcast all sponsored programs offered during specified hours. The Commission believed this practice significantly restrained the ability of licensees to exercise their program selection responsibilities. In May, 1963, the Commission prohibited the "option time" practice for this reason, also concluding that it was anti-competitive and unreasonably restrictive of non-network program suppliers' access to station time, including the bulk of prime time. The Commission expected that its action would foster licensee programming responsibilities and that an "...improvement of

---

*/ Second Interim Report, Television Network Program Procurement (Part I), November 28, 1962, reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. 13-195 (1963); and Second Interim Report, Television Network Program Procurement (Part II), July 2, 1965.

competitive conditions and the position of 'fenced out'..." non-network programming sources would result from its action.*/

In the option time proceeding, Group W proposed the adoption of a rule substantially similar to the access rule. Group W took the position that the mere elimination of option time would not cure the problems emanating from network domination. The Commission, however, concluded in light of its action prohibiting option time that it should await developments in the industry, operating without option time, before considering the implementation of Group W's proposal. The Commission explained:

> "We do not say that the public interest would never be served by action along some of the lines just mentioned; if it so appears of course such action will be considered. But for the present, with the major step taken herein, it would be premature to consider further measures until we have the benefit of observation of future developments."**/

Approximately three years later in Docket No. 12782, Group W, recognizing that the Commission's objectives in prohibiting option time had not been realized, resubmitted its earlier proposal (See Report and Order, ¶12). Group W urged that it had become even more necessary to provide individual stations with meaningful programming alternatives--that licensees should be able to exercise more than a nominal choice in programming to serve local needs.

On September 20, 1968, the Commission issued an Order which set the matter for oral argument and invited further comment on the Group W

---

*/ Second Report and Order re Television Option Time, 34 FCC 1103, 1128, 25 Pike & Fischer R.R. 1651, 1680 (1963).

**/ Id at 1131, 25 Pike & Fischer R.R. at 1683.

counter-proposal. Oral argument was held before the Commission en banc on July 22-23, 1969.

On May 7, 1970, the Commission released a Report and Order adopting the prime time rule. Network Television Broadcasting, 23 FCC 2d 382 (1970). Also adopted at the same time as part of a comprehensive regulatory plan to deal with the problem of network dominance were rules prohibiting networks from engaging in program syndication and from acquiring financial interests in program supplied to networks for exhibition.*/

After review of the exhaustive record compiled in Docket No. 12782, the Commission concluded that the elimination of option time in Docket No. 12859 had not served to encourage individual licensee programming responsibility and "multiply competitive programming sources." Network Television Broadcasting, supra, 23 FCC 2d at 396. Consistent with its "continuing program" to encourage such responsibility, the Commission found adoption of the access rule was appropriate and in the public interest. The Commission found that in the prime time evening hours when the vast preponderance of viewers watch television, control over programming and of access by program suppliers to individual stations is heavily concentrated in the three networks. Network Television Broadcasting, supra, 23 FCC 2d at 385-86.

It was concluded that this excessive level of concentration seriously unbalanced the market to the disadvantage of independent, non-network

---

*/ Section 73.658(j) of the Commission's Rules (47.C.F.R.§73.658(j)). These regulations are popularly called the network syndication and financial interest rules.

programming sources and effectively precluded the development of alternative prime-time programming. First-run, independently produced and syndicated programming had virtually disappeared. Network Television Broadcasting, supra, 23 FCC 2d at 385-87. While acknowledging there was no sure guarantee that its action would result in the development of competitive programming sources, the Commission believed the "likelihood that independent production will succeed is sufficiently great...that it should be given an opportunity." Network Television Broadcasting, supra, 23 FCC 2d at 396-97.

The rule was deliberately limited to affiliates in the 50 largest markets and left the networks completely free to offer any programming they desired, in the hope they would continue to offer a full evening schedule to all markets.*/ The Commission's ultimate desire was "to provide opportunity--now lacking in television--for the competitive development of alternative sources of television programs so that television licensees can exercise something more than a nominal choice in selecting programs..."**/

On August 14, 1970, the Commission released a Memorandum Opinion and Order affirming its adoption of the access rule with certain minor changes. Network Television Broadcasting, 25 FCC 2d 318 (1970).

---

*/ Unfortunately this hope was not realized as the networks did cut back their schedules to three hours per evening. Although not required by the rule, the present practice of each of the three networks is to offer three hours of programming each evening. In the current season, network program service regularly is offered by all three networks in the 8:00-11:00 p.m. period (7:30-10:30 p.m. Sundays). (See Report and Order, ¶25.)

**/ Network Television Broadcasting, supra, 23 FCC 2d at 397.

B. The Proceedings in Docket No. 19622

In response to petitions by National Broadcasting Company, Inc., MCA, Inc. and two other parties, the Commission on October 30, 1972 released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 19622 (J.A. 1-33) (hereinafter cited "Notice, ¶ ____"). The Notice sought information as to the effect and operation of the access rule and invited comment "...on changes in that regulation which may be appropriate for the future." (Notice, ¶1).

It was basically divided into three sections. In Section II-A of the Notice, the Commission requested various information concerning the effect and impact of the rule's operation. (Notice, ¶16-25).

Section II-B outlined specific rule-making proposals on which comment was invited. (Notice ¶26-50). These proposals included: (1) possible modification in the rule to a total or partial 21-hour per-week standard; (2) rule changes to obviate certain problems caused by the differences in time zones across the United States; (3) modifications with respect to the broadcast of sporting events by networks; (4) the possible relaxation of the "off-network" restriction; (5) possible modification of the "feature film" restriction; (6) further exemptions concerning network news and public affairs programs; (7) the effective date of any changes which may be made; and (8) the possible repeal of the rule. Concerning the question of possible repeal, the Commission cautioned that it had not reached any tentative conclusions in this respect:

> "Indeed, we stress that the presumption is the other way: the Commission has a rule which is now going into full effect and there is thus a clear and considerable burden upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest..." (Notice, ¶15).

Section II-C of the Notice dealt with the Inquiry phase of the proceeding. (Notice, ¶51-57). In addition to possible extensions in the scope of the rule, the topics enumerated in this section included: (1) the possibility of specifying required uses of certain time periods by local stations: (2) encouraging the broadcast of certain types of network or off-network program material through exemption from the rule's provisions; and (3) specifying a particular period as the "access period." With respect to these topics, it was stressed that the proceeding was "...an Inquiry only with changes along these lines to be adopted, if at all, only after further rule-making proceedings... " (Notice, ¶51) (Emphasis added.)

In January of 1973, extensive comments were submitted in response to the Commission's Notice. In its comments, Group W reaffirmed its support for the fundamental concept embodied in the access rule.*/

---

*/ Group W stated that "by placing a modest limitation on the amount of network programming which may be broadcast by stations each evening during the viewing hours when most people watch television, the rule insures that local stations will function as more than a conduit for the programs of one of the three national networks. In Group W's opinion, it is a reasonable regulatory solution to the critical problem of network domination of prime time which was documented in Docket No. 12782. The rule or one like it is essential if individual licensees are to occupy a meaningful role in our nation's television broadcast system." Group W comments, filed January 15, 1973, page 3.

Two national networks, CBS and NBC, sought repeal of the rule, while the third network, ABC, supported its retention. NBC subsequently changed its position during oral argument. (Report and Order, ¶26.) In addition, the five "major" Hollywood film producers urged its immediate repeal.

Subsequent to the receipt of comments by the Commission, the Office of Telecommunications Policy, Executive Office of the President, submitted a report to the Commission which, in brief part, dealt with the prime time access rule.*/ In a letter accompanying the report, the Director of the Office of Telecommunications Policy recommended "...that the prime-time rule be changed to allow the networks to program on a regular basis in the 7:30-8:00 p.m. time period...."**/

On July 30-31, 1973, oral argument was held before the Commission en banc. Thereafter, the Commission released a Public Notice on November 29, 1973 announcing that it had instructed its staff to prepare a decision in

---

*/ Office of Telecommunications Policy, Analysis of Causes and Effects of Increases in Same-year Rerun Programming and Related Issues in Prime Time Network Television, March, 1973. Without further explanation, the part of the report dealing with the access rule stated: "In the past year, the prime-time access rule has had a significant impact on the quality of the original TV program production. In the 1971-72 season, the time in question was devoted almost entirely to non-original programming, replacing original and rerun network programming. Whether this would continue to be the case in the future is less clear, but it does seem likely that access time will probably be devoted to programs of lower costs and lower employment than network programming." p. 30.

**/ Letter from Clay T. Whitehead to the Honorable Dean Burch, Chairman, Federal Communications Commission, dated March 21, 1973.

the proceeding. (J.A. 47). The Public Notice outlined in general the terms of the revised rule but gave no indication of the effective date of the changes.

On February 6, 1974, the Commission (Chairman Burch, and Commissioners Lee, Reid Wiley and Hooks) released its final Report and Order in the proceeding. (J.A. 51-179). While the Commission found the relatively short period the access rule had been in effect did not provide a fair test of its potential, */ it nonetheless concluded that certain revisions would be appropriate. These revisions were characterized as "basically not great." **/ Because of the inadequate trial period, the Commission found that it "...need not look too closely at the programming record under the rule so far." (Report and Order, ¶92). The same reason was cited for rendering study of the impact of the rule on the stimulation of independent program production unnecessary. "[W]e need not at this point get into this question." (Report and Order, ¶95).

Initially, the Commission changed the name of the rule to the "Evening Programming Requirements" rule. (Report and Order, Appendix A). Then, concluding that "some increase in network programming should be permitted," (Report and Order, ¶79), the Commission opted not to continue the three-hour limitation on the carriage of network programming in the 7:00-11:00 p.m. prime time period by affiliates subject to the rule. In its place, the revised rule, with certain exceptions, bars affected network affiliates from carrying

---

*/ Report and Order, ¶89-91.

**/ Report and Order, ¶116. It goes without saying that Group W does not subscribe to this characterization.

network programming in the 7:30-8:00 p.m. periods Monday through Saturday. The Commission described its action as removing all restrictions on the 7-7:30 p.m. period as well as 7:30-8:00 p.m. Sunday evening period. (Report and Order, ¶79). In its view, this apportionment of the 7-8 p.m. hour, the crux of its decision, simply represented "...an adjustment of competing demands for access or exclusive access..." (Report and Order, ¶82).

Assertedly to facilitate the broadcast of network or off-network "children's specials" before 8 p.m. and to make the broadcast of network or off-network "public affairs" and "documentary" programs easier, the Commission also provided that stations could use one of the six specified "access" periods for such material. (Report and Order, ¶83-84). The term "documentary programming" is defined to mean "...any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants." (Revised Section 73.658(k)(l)(ii).

With respect to the designated "access" periods, the Commission set forth its expectation:

> "...that stations subject to the rule will devote an appropriate portion of this "cleared" time, or at least of total prime time, to material designed for children, material which is of particular significance with respect to interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs

and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs." (Report and Order, ¶88).

As set forth in sub-paragraph (k)(2) of the revised rule, the Commission further liberalized the categories of network programming excluded from the operation of the rule. */ Finally, the Commission set September 1, 1974 as the effective date of the revised rule, citing what it asserted were the minor nature of the revisions. (Report and Order, ¶113-16.) **/

Three of the then five Commissioners issued separate statements. Chairman Burch stated the rule should have been repealed in its entirety, but concurred in the Commission's action because "... it might have been worse...." (J.A. 168). Commissioner Reid

---

*/ These further exceptions include certain "runovers" of sports events carried on the network during the late afternoon provided the telecast is scheduled to end normally before 7:00 p.m.; the telecast of certain international sporting events, certain college football games and other "special" network programs (other than sports events or motion pictures) where the network devotes all of its time after 8 p.m. to the program; no more than five "pre-game shows" each year in connection with important evening sporting events; special news programs dealing with fast-breaking news events and related programs; and political broadcasts by or on behalf of legally qualified candidates for public office.

In addition, whenever a network broadcasts a program "live" and "simultaneously" throughout the continental United States, the program will not count as a network program for affiliated stations in the Mountain and Pacific Time Zones if the telecast complies with the provisions of the revised rule with respect to stations in the Eastern and Central Time Zones.

**/ Subsequently, on February 27, 1974, the Commission (Chairman Burch; Commissioners Lee, Reid, Wiley and Hooks concurring in the result) refused to stay the effective date of the revised rule for one year (J.A. 180-183).

also would have repealed the rule but voted for the Commission's compromise because it "seemed to be the closest to total repeal that could be obtained...." (J.A. 177). And Commissioner (now Chairman) Wiley, expressing trepidation because the Commission set forth its "expectations" as to how licensees should use the new "access" periods, nonetheless supported the compromise plan bacause it "...was capable of achieving some consensus within the Commission, however fragile." (J.A. 178-79).

ARGUMENT

I. THE COMMISSION'S ACTION IS NOT SUPPORTED BY ADEQUATE FINDINGS

At the outset, we point out that the importance of the Commission's regulatory program under review far transcends the interests of the parties to this appeal. It directly affects the rights of the public to receive programming from diverse and antagonistic sources. In two current major antitrust proceedings, the Federal courts have been relying heavily on the original access rule in deciding important antitrust questions involving networks and major motion picture producers.

In a major antitrust suit brought by the Justice Department against the three national networks alleging the monopolization of prime time

television entertainment programming, the United States District Court for the Central District of California has warned that, should the Government prevail, the access rule would be given "great weight" in affording the Government a remedy. While denying defendants' motions to dismiss, the Court indicated that this caveat "...as a practical matter, might render the prosecution of these cases unnecessary, but that is for others than the Court to decide." United States v. National Broadcasting Company, Inc., [5 Trade Reg. Rep. (1974 Trade Cases)] ¶74,885, at 95,992 (C.D. Cal., October 29, 1973). */

Because of this practice of the courts to defer to the expertise of the Federal Communications Commission in remedying the effects of network dominance, it is even more important that any fundamental changes in the regulatory scheme should be carefully explained by the Commission and based on solid findings so as to be subject to intelligent review by the courts.

---

*/ Similarly, in a private antitrust suit brought by major film producers against two television networks, the United States District Court for the Southern District of New York recently refused temporary injunctive relief relying in part on the access rule. Columbia Picture Industries, Inc. v. American Broadcasting Companies, Inc., [5 Trade Reg. Rep. (1974 Trade Cases)], ¶74,912 at 96,100-101 (S.D.N.Y., February 4, 1974).

A. The Regulation is Improperly Based on the Competing Demands of Private Parties.

Section 303 of the Communications Act of 1934 (47 U.S.C. §303) requires the Commission to act in the public convenience, interest and necessity. */ This standard is the "...touchstone for the exercise of the Commission's authority." F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). **/ Notwithstanding this Congressional injunction, the one interest the Commission failed to consider in any significant manner was that of the public in receiving more diverse and

---

*/ Among the powers and duties cited by the Commission as authority for the action under review (see Report and Order, ¶120) are the following:

"(b) Prescribe the nature of the service to be rendered by each class of licensed station and each station within any class;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter...

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

**/ See also Beaumont Broadcasting Corp. v. F.C.C., 202 F.2d 306, 310-311 (D.C. Cir. 1952) ("there is no doubt that the Commission's overriding duty is to protect the public convenience, interest and necessity.")

independent program sources. Rather than keeping the public interest as its polestar, the Commission erroneously sought to achieve "an appropriate balance" by composing the "competing demands for access or for exclusive access" of the parties in the proceeding. (Report and Order, ¶82). This compromise of private demands is candidly acknowledged by the Commission in its Report and Order. */ In a recent address, this was reiterated by the Commission's General Counsel who served at the time the revisions were adopted. According to a report in the trade press, the Commission's former chief legal officer characterized the action as follows:

> "Mr. Pettit asserted the recent revision of the prime-time access rule is 'a dangerous, dangerous precedent' which 'puts the government in the position of using its judgment concerning the quality of programming.'
>
> The revision, now before the U. S. Court of Appeals for the Second Circuit of New York, 'spells trouble for everyone, including the public,' Mr. Pettit said. 'The Commission started out with all good ends in mind, and ended up with infringements of the First Amendment. It bothers me.'
>
> 'Everyone was willing to compromise, and that's what they came up with. One commissioner was concerned about children's shows, another about game shows; it

---

*/ "It may be that, like many compromises, this will entirely please no one." (Report and Order, ¶82). Commissioner Reid concurred with the Commission's action only because "...the compromise...seemed to be the closest to total repeal that could be obtained." (Report and Order, Separate Concurring Statement, Commissioner Charlotte T. Reid).

was people coming at the problem from a lot of different problems.'"*/

To appease the networks, the Commission permitted a sizeable increase in the amount of network programming which could be carried by affiliated stations. (Report and Order, ¶79). Removal of all limitations on the 7-7:30 p. m. period was justified in part by the asserted need to "...relieve the problems of the 'majors' and similar parties, by increasing the aftermarket for former network material." (Report and Order, ¶80). On the other hand, reservation of five one-half hour periods free of off-network material or feature films was apparently intended to satisfy the proponents of the rule.

That Commission action can (and in some cases undoubtedly should) achieve compromise is undisputed. In such cases, however, the action must be based on proper public interest considerations. The crude manner in which the Commission here sought to subdivide the "spoils" of the access rule among the rule's supporters and detractors is a gross parody of its duty. As Mr. Justice Frankfurter wryly observed in his landmark

---

*/ Address of John W. Pettit, Esquire to the International Radio and Television Society, March 12, 1974, as quoted in Broadcasting, March 18, 1974, at 47.

Pottsville opinion, "the Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication."*/ Much the same thought was expressed by this Court when it said the role of an administrative agency "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 620 (2nd Cir. 1965), cert. denied, 384 U.S. 941 (1966).

This Court was faced with a similar situation in American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439 (2nd Cir. 1971) which involved the Commission's rate-making authority. There the Court refused to uphold the Commission's action, saying:

> "The Commission's authority to prescribe rates and practices is derived from Section 205(a) of the Communications Act. That authority is not unlimited. To prescribe a practice the Commission must find that it is 'just, fair and reasonable,' and to prescribe a rate it must find that the rate is 'just and reasonable'. Valid findings of this kind

---

*/ F.C.C. v. Pottsville Broadcasting Co., supra at 138.

> are therefore essential to any exercise by the Commission of its authority under §205(a).
>
> "In this case, however, instead of making the essential statutory finding that unlimited sharing would be a just, fair and reasonable practice, the Commission merely stated that it viewed unlimited sharing as 'the best of the alternatives discussed herein'." 449 F.2d at 450.

As in American Telephone and Telegraph, the Commission here settled for a makeshift result. The agency's apparent conclusion that half an access rule represents an "appropriate balance" between the competing demands of private parties leaves the public interest out in the cold.

B. The Decision is Internally Inconsistent and Lacks Rational Explanation

Section 4(c) of the Administrative Procedure Act, 5 U.S.C. § 553(c), requires an agency to provide "...a concise general statement of...[the] basis and purpose" of any rule which it may adopt. Pursuant to this statutory requirement, "...it is incumbent on an administrative agency to supply clear findings and reasons supporting the findings whenever it seeks to exercise its power. Meaningful review cannot otherwise be obtained. These axioms are deeply rooted in American administrative process and need no citation." International Paper Co. v. F.P.C., 476 F.2d 121, 128 (5th Cir. 1973). See also WAIT Radio v. F.C.C., 418 F.2d 1153 (D.C. Cir. 1969). Where such explanation and supporting

findings are not supplied, as is the case here, the agency's action may not be upheld. */

We do not dispute the fundamental authority of an administrative agency to substantially modify or even repeal its regulations. Regulatory amendments may flow from an administrative agency's changing concept of the public interest or objective change in essential circumstances with the passage of time. Greater Boston Television Corporation v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1971), cert. den., 403 U.S. 923 (1971). However, as can best be divined from the Report and Order, neither change occurred here. There is no indication in the Report and Order that either the conditions which compelled the adoption of the access rule or the Commission's concern about those conditions has altered. Indeed, considering the fact that the modifications constitute a "partial repeal", the Report and Order is startingly devoid of discussion of the underlying issues.

Nor is this a case where the Commission purports to repeal or substantially modify a regulation because it hadnot achieved its goal.

---

*/ Section 10(e)(2) of the Administrative Procedure Act (5 U.S.C. §706(2)(A)) states that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

On the contrary, the Commission characterized its changes here as relatively minor (Report and Order, ¶116), and expressly found that an evaluation of the access rule's effectiveness would be premature. */ (Report and Order, ¶89-91).

Our challenge is to the Commission's failure to supply adequate reasons or rational analysis, based on legitimate considerations, for the major surgery it has worked upon the access rule. For example, no explanation is offered for the abrupt amputation of all Sunday evening restrictions except the barren observation that "some increase in network programming should be permitted..." While, indeed, Sunday evening may be "traditionally a popular family entertainment network period" (Report and Order, ¶79), what does this have to do with the critical and urgent concerns which prompted the restriction in the first place?

---

*/ Thus, the Commission found it unnecessary to look "...too closely at the programming record under the rule so far" because it "...has not yet had a fair test to determine its potential..." (Report and Order, ¶92). For the same reason, determination of the rule's effect on the stimulation of new and independent sources of program production was deemed unnecessary. "[I]n view of our basic conclusion above that it is too early to evaluate the full potential of the rule, we need not at this point get into this question." (Report and Order, ¶95).

All so-called restrictions on the 7-7:30 p.m. time period (Monday-Friday) were also removed.*/ The Commission thus reduced the time cleared of network programs on weekdays by one-half merely because: (1) stripped game shows, which it dislikes, have been carried by many stations in that time period;**/ and (2) the networks' had not programmed this particular half-hour prior to adoption of the rule. The first of these points obviously has nothing to do with the underlying reasons for the rule and the second will in all probability operate directly counter to them. In this regard, one network has already announced to the Commission that its network service in the newly-available time periods will commence with the Fall 1974 season."***/

---

*/ Because the original access rule never placed any restrictions on the 7-7:30 p.m. period, the Commission has mischaracterized its operation. The networks' choice -- not the requirements of the access rule -- kept this period free of network programming. The original access rule simply limited to three hours the amount of network programming which affiliated stations could carry in the 7:00-11:00 p.m. period and left affiliated stations free to clear any network program in this or any other half-hour period.

**/ This period "...represents singularly little in the way of opportunity for the development of really new syndicated material." (Report and Order, ¶79). While the Commission may view its decision in simple terms of avoiding a "contest between stripped game shows and stripped off-network material..." (Report and Order, ¶79), really much more is involved. The original purpose of the rule was not to encourage particular types of programs (see Network Television Broadcasting, supra, 23 FCC 2d at 397) but to limit networking in order to foster independent and diverse program sources.

***/ Response of Columbia Broadcasting System, Inc. to Petition for Stay, filed February 21, 1974.

No explanation is offered for removal of the Saturday evening 7-7:30 p.m. limitation except that, in view of the Commission's action with respect to the corresponding Monday-Friday and Sunday periods, "there seems little point in maintaining the restriction only for Saturdays". (Report and Order, ¶79).

The Commission also observed that removal of the 7:00-7:30 p.m. restriction would "...to some extent relieve the problem of the 'majors' and similar parties, by increasing the aftermarket for former network material." (Report and Order, ¶80). As a purely private interest, the economic health of the "major" Hollywood studios is clearly beyond the pale of the Commission's regulatory concern.*/ More lamentable, the Commission's desire to foster old network program material contradicts its intention to encourage new independent programming.**/

Changes of this magnitude in a major regulatory scheme require more reasoned analysis than the essentially irrelevant explanations

---

*/ Thus, in one section of the Report and Order, the Commission stated that the impact on Hollywood involved an area "...outside of the normal ambit of the Commission's expertise." Report and Order, ¶98.

**/ Other reasons given for this change are similarly inadequate. The "increasing demands for its relaxation" by private parties in various waiver requests submitted through the Commission is not, by itself, a reason to relax the rule. (See Report and Order, ¶80). Nor, in view of the announced purposes of the rule, is the "...possibility of increasing network news time from its present half-hour..." an adequate explanation of the Commission's action.

offered by the Commission here. Not only are the explanations irrelevant to or largely inconsistent with the original purpose of the rule but they are inconsistent with the major finding developed in the entire rule making proceeding -- that it is too early to make any significant determinations about the operation of the access rule.

"Inherent in the responsibility entrusted to this court is the requirement that...[it] be given sufficient indication of the basis...[on which the agency acted so that it] may consider whether it embodies an abuse of discretion or error of law." Kennecott Copper Corp. v. Environmental Protection Agency, 462 F.2d 846, 849 (D.C. Cir. 1972). Such a reasoned explanation is altogether lacking and, for this reason, the Commission's action must be reversed. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); H & H Tire Co. v. United States Dep't of Transportation, 471 F.2d 350 (7th Cir. 1972).*/

II. THE REVISIONS TO THE ACCESS RULE ARE INCONSISTENT WITH ITS PURPOSES

As explained by the Commission, the rational basis for its 1970 decision to adopt the access rule was that the:

---

*/ See also, City of Chicago, Illinois v. F.P.C., 458 F.2d 731, 741-44 (D.C. Cir. 1971) cert. denied, 405 U.S. 1074 (1972) for a further discussion of the role of the appellate court in reviewing administrative action involving exercise of the agency's rule-making authority.

> "...television broadcast structure is over-centralized and poses a serious question as to whether the basic concept of a competitive, locally responsible television structure as envisioned by Congress and this Commission is being implemented. One principal objective of our prime time access rule is to lessen the degree of network domination of station operation... The present degree of network dominance of television broadcasting, now so graphically confirmed by the letters and petitions filed on reconsideration, emphasizes the need for Commission action to improve this situation and to seek to reestablish licensee individuality and responsibility as operable factors in television broadcasting." Network Television Broadcasting, 25 FCC 2d 318, 329-30 (1970) (Emphasis added).

The facts underlying this conclusion were, in the Commission's words, "...relatively simple and...quite compelling." Network Television Broadcasting, supra, 23 FCC 2d at 385. Three national networks controlled access to the crucial prime time evening hours when most viewers watch television. Finding this an "...inherently unhealthy situation in several respects," the Commission concluded that the public interest required:

> "...Limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structures combined have centralized control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time." Network Television Broadcasting, supra, 23 FCC 2d at 394.

These conclusions are as valid now as when adopted. They have not been rejected and indeed they have never been challenged. Presumably they

remain the basic underpinning of the Commission's access rule as now amended. Certainly the Commission has given no indication that its fundamental view of the problem of network dominance has changed.

Viewed in these terms, the Commission's action now under review is not subject to logical explanation. While the original purpose of the rule was to place a modest limitation on networking in order to break the stranglehold of the three national networks on prime time television, the Commission's revisions now under review run directly contrary to this purpose. This is perhaps best illustrated by the fact that, under the revised rule, network affiliates subject to the rule will be able to carry more network programming in prime time (7-11 p.m.) then was customarily carried before the access rule was first adopted. In 1970, the Commission found that it was the usual practice of each network to offer 3-1/2 hours of programming (4 hours on Sunday) during the 7-11 p.m. prime time period each day. */ On a per week basis, this meant that each network programmed 25 out of the 28 available hours each week.

Under the revised rule, licensees will be permitted to carry 25-1/2 hours of network material (and more when the liberalized sports run-over,

---

*/ Further, the record before the Commission indicated that network affiliates typically cleared an average of approximately 93% of this network programming each week. See Brief for Intervenor Westinghouse Broadcasting Company, Inc. at 8-9, Mt. Mansfield Television, Inc. v. F.C.C., 440 F.2d 470 (2nd Cir. 1970).

political broadcast, and other exceptions are utilized). By removing all Sunday limitations and inviting the networks into the 7:00-7:30 period, the revised rule increases the opportunity for the networks to dominate prime time. It appears they will program more hours now than they did before the Commission found the three network funnel caused such an unhealthy situation.

This result cannot be reconciled with the stated purposes of the rule. Indeed, the Commission has not even attempted to justify its changes in terms of those objectives. Rather, the reasons given for the removal of the various limitations are, as explained earlier, irrelevant to the basic concern of network dominance.

For example, the reason given for the new provision permitting certain types of network programming to be shown in one of the 7:30-8:00 p.m. Monday-Saturday periods is to facilitate the broadcast of such program matter (Report and Order, ¶83-84). As to network children's "specials," the Commission thought it "...desirable in the public interest to facilitate the showing of such material earlier..." than 8:00 p.m.*/ And insofar as the broadcast of network documentary and public affairs programs was concerned,

---

*/ Report and Order, ¶83. Again, this misstates the operation of the rule. No provision of the original rule prohibited a network from offering a children's program earlier than 8:00 p.m. if the network desired to do so. Presumptively, there was no need for this change. It has been held that "a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." City of Chicago, Illinois v. F.P.C., supra, 458 F.2d at 742.

the Commission similarly concluded that "...the rule should be changed to make such broadcasting easier." (Report and Order, ¶83).

Assuming that it was the Commission's intention not to effectuate a major shift in policy, the rule changes are so fundamentally inconsistent with the stated objectives of the rule that they cannot be sustained. By its own admission, the Commission was motivated in large part by a desire to increase the opportunities for the presentation of network program matter in prime time -- a desire counter to the original purpose of the access rule to limit network control of prime time television. Similarly, the other purported justifications for the revisions made by the Commission bear no rational relationship to the original (and purportly unchanged) purposes of the access rule. (See Section I-B, supra).

When measured against the Commission's original findings made in 1970 when the rule was first adopted, the action now before the Court is clearly arbitrary. */ Similar to the situation in City of Lawrence,

---

*/ There should be no question that this is the appropriate standard by which the revised rule must be judged. When an agency "...announces principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces. This is so not only upon the authority of Securities Comm'n v. Chenery Corp. [318 U.S. 80 (1943)]. but because any other course would permit an administrative agency to announce a proper principle and, under that protection, achieve an improper result by unrevealed considerations wholly apart from the announcement. The prescribed judicial review would be set wholly at naught by any such procedure." Mississippi River Fuel Corp. v. F.P.C., 163 F.2d 433, 449 (D.C. Cir. 1947) (Prettyman, J).

Massachusetts v. C.A.B., 343 F.2d 583 (1st Cir. 1965), the Commission's action is, on its face, fundamentally inconsistent with established policy and may not be permitted to stand;

> "...the Board's decision, without explanation, reverses an earlier case involving essentially the same questions; ...departs from the reasoning and holding in other regional airport cases; ...and is inconsistent with other aspects of this same proceeding... Such action is arbitrary and capricious, and must be reversed." Id. at 588. See also F.T.C. v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970).

On the other hand, if it was the Commission's purpose to shift the focus of its policies away from the problem of network dominance, then the Commission erred by failing to admit to a change in policy or to articulate the reasons for the change. While an agency's conception of the public interest may change, "...an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored..." Greater Boston Television Corporation v. FCC, supra, 444 F.2d at 852. Nowhere in the Commission's Report and Order may any indication be found that the action therein represents a major shift in policy.

If this Court were to find that the Commission had secretly changed its policies without any explanation or admission of change, the order under review could not stand. The Supreme Court has recently spoken to this point:

> "Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's actions and so may judge the consistency of that action with the agency's mandate." Atchison, Topeka and Santa Fe Ry. Co. v. Wichita Board of Trade, 93 S.Ct. 2367, 2375 (1973).

The desires which motivated the Commission to act in this matter are quite different than those considerations which compelled the Commission to adopt the access rule in 1970. The concern over network dominance appears to have shifted to a concern over what types of programs are viewed by the American public. */ No longer satisfied with the original name of the rule, the Prime Time Access Rule, the Commission has now changed it to the "Evening Programming Requirements" rule. The various exceptions and exemptions now built into the rule appear more for the purpose of encouraging (or discouraging) particular types of programs rather than remedying the problem of network dominance. **/

---

*/ With respect to the programming record under the rule so far, it "... can hardly be called distinguished, and there are certain developments which unquestionably are, as they should be, grounds for concern, and will be grounds for much greater concern if the picture, three years from now, is generally the same." (Report and Order, ¶92). The Commission's concerns are (1) the stripping of programs, (2) the increased use of foreign product, and (3) the greatly increased use of game shows.

**/ The only references to the earlier proceedings in Docket 12782 are found in an introductory section of the Report and Order entitled "Background". (Report and Order, ¶4-24). The conclusions section of the Report and Order (¶77-122) is completely devoid of any reference to these earlier proceedings or the policies established therein.

This Court is faced with two alternatives, neither of which will permit the Commission's action to stand. Either (1) the revisions made to the rule are so fundamentally inconsistent with its objectives as to render the Commission's action arbitrary and capricious; or (2) the Commission has secretly changed its policies without notice or explanation. In either case the Commission's action must be reversed.

III. IN VIEW OF THE FINDING THAT THE RULE HAS NOT HAD A FAIR TEST, THE COMMISSION ERRED IN DRASTICALLY CHANGING THE RULE

The critical finding made by the Commission concerned whether the rule has had a fair test:

> "...the proponents and opponents of the rule differ sharply as to whether, at this point, the rule has had a fair test. In our view, it has not... In reaching this conclusion, we note the rule's relatively new status -- in the first half of its third year, with the first in a sense 'a different ball game' in that off-network material and all feature film could be used -- and the historic preference of stations and others for the 'tried and true' which takes time to overcome (e.g. ABC's showing concerning the popular TV shows of the 1940's as being continuations of radio programs). Of equal, and perhaps greater, importance is the unfavorable climate which has prevailed, due to the uncertainty as to the rule's future for a number of reasons mentioned previously." (Report and Order, ¶89).

The limited evidence before the Commission concerning the rule's operation was simply insufficient to provide a appropriate basis for any

final judgment.*/

This conclusion should have precluded any major modification of the terms of the rule because of the sheer inability to make findings based on the record of experience.**/ Instead, it was the prelude to partial repeal of the rule. The Commission's reasoning is absurd on this point -- because the evidence before it was insufficient to judge the rule, only a partial repeal was warranted.

In addition to this basic infirmity, the Commission's reasoning is inconsistent with the heavy burden originally imposed upon the rule's opponents to show that it was not working. In initiating the proceedings now before this court, the Commission stressed that a clear presumption existed in favor of retention of the rule as originally promulgated:

"...There is thus a clear and considerable burden

---

*/ In adopting the rule, the Commission had found that it's potential for success could not "...be determined with absolute certainty short of some operational experience under competitive conditions. The likelihood that independent production will succeed is sufficiently great, in our judgment, that it should be given an opportunity." Network Television Broadcasting, supra, 23 FCC 2d at 396-97. Subsequent to the adoption of the rule, the Commission announced that while there was a sharp difference of opinion among individual Commissioners concerning the rule, the Commission was unanimous that it "should receive a full and fair test..." In re Petition of MCA Inc., 34 FCC 2d 825, 826 (1972).

**/ This dilemma explains the lack of findings in support of the modifications which were made.

upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest, particularly in light of...[it's important] purposes..." (Notice, ¶15).

Essentially, the reasoning of the Report and Order reversed this presumption. While the Commission was unable to find that anyone sustained this burden, it nonetheless proceeded to repeal the rule in large part.

IV. THE COMMISSION'S RULE ABRIDGES FIRST AMENDMENT RIGHTS AND CONSTITUTES CENSORSHIP

The Commission's rule presents the Court with a prima facie violation of both the First Amendment and the statutory proscription of Commission censorship. */ Restraints on broadcasters' programming freedom can be justified only if their clear purpose and effect is the achievement of First Amendment objectives. The restraint here does not even purport to further such goals. Rather, it is a manifest expression of Commission program preferences which necessarily falls short when measured against the competing interests and values of the First Amendment.

For the first time in history the Commission has promulgated a rule

---

*/ Section 326 of the Communications Act of 1934 (47 U.S.C.§326) provides: "Censorship
"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

which undertakes to specify the particular types of programming which may be carried in a particular time period. Section 73.658(k)(1) of the now modified rule provides, in effect, that if the licensee chooses to carry network or off-network programming during one of the six "cleared" half hours weekly (7:30 to 8:00 p.m. E.T.) that programming must consist of children's "specials" or documentary or public affairs programs as defined therein.*/ The section thus operates as a prohibition on the exercise of the licensees programming choices for the relevant time period.**/

The purpose of the First Amendment is "to preserve an uninhibited market-place of ideas."***/ Broadcasting and television clearly fall within the aegis of its protection.****/ Moreover, the law does not distinguish

---

*/ Group W fully subscribes to the desirability of more informational and documentary programming, community-oriented programming and the carriage of children's programs during appropriate time periods. (See Report and Order, ¶ 83 and 88). Our concern for the constitutional abridgement here reflects agreement with Professor Kalven's observation that "...freedom has in no small part depended on an awareness of the difference between doing something as a matter of grace and doing it as a matter of obligation". Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15, 23 (1967).

**/ Except for off-network syndicated programs, the rule necessarily will operate in the first instance as a restraint on the networks. Lacking outlets in the 50 largest markets for other than "authorized" programming during the "sixth half hour", obviously network programs for that time period will be limited to the categories designated by the Commission.

***/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

****/ United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

between types of programs. The "give-away" show is as entitled "'to the protection of free speech as the best of literature' or music". American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953) (three-judge court) citing Winters v. New York, 333 U.S. 507 (1948), affirmed 347 U.S. 284 (1954). */

The right of the broadcaster to exercise freedom of program choice is not absolute and Commission regulations can fetter that freedom to a limited degree. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). This limited Governmental interference is really a balancing of the respective First Amendment rights of the public and of broadcasters and has been tolerated to insure that the ultimate First Amendment objective -- free access of all the people to diverse ideas -- is preserved.

> "...the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * * It is the right of the public to receive suitable access to social, political, esthetic,

---

*/ Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) where the Court repudiated the view that movies were purely entertainment and beyond the reach of the free speech protection. Professor Kalven notes that the tradition underlying the law's refusal to distinguish between news and entertainment "...perhaps begins back in 1808 with Lord Elleborough's opinion in Carr v. Hood, 1 Campbell 350, 354 (1808)". Kalven, supra, p. 29.

moral, and other ideas and experiences which is crucial here." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390-91 (1967).

Nevertheless, the Government's power to specify material which the public interest requires or forbids to be broadcast "carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike". */ It is this threat to liberty, inherent whenever the Government dictates what may be seen or heard, which has required that such restraints be tolerated only if the paramount public right to the market place of diverse ideas is thereby enhanced. The risk of enlargement of Government control over the content of broadcasting is a "problem of critical importance to broadcast regulation and the First Amendment". **/

Commission policies and regulations such as the access rule, the fairness doctrine, the chain broadcasting and multiple ownership rules (47 CFR §§73.131, 73.240) have been sustained over constitutional objection because they "expand the diversity of expression on radio and television " ***/ No such beneficient result is claimed by the Commission for the restraints imposed by the "Evening Programming Requirements"

---

*/ Banzhaf v. F.C.C., 405 F.2d 1082, 1095 (D.C. Cir. 1968) cert. den. sub. nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969).

**/ CBS, Inc. v. Democratic National Committee, ____U.S.____, 93 S. Ct. 2080, 2098 (1973).

***/ Id. at 2091, n. 10.

rule challenged here.

In Red Lion, supra, after approving a limited restraint, the Court went on to state:

> "We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to §326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues." Red Lion, supra, 395 U.S. at 396.

While the Commission here has not barred the carriage of particular programs, it has obviously prohibited broadcasters from carrying many types of programs during the affected period. More important, this is not done in the name of First Amendment goals but because of what the Commission saw as the "worthwhile" nature of other required programs and a vague conclusion that it would facilitate the public interest. "To sacrifice First Amendment protections for so speculative a gain is not warranted. */

---

*/ CBS, Inc. v. Democratic National Committee, supra, _____U.S. at _____; 93 S. Ct. at 2099.

Thirty years ago Judge Learned Hand, in upholding the validity of the Commission's "chain broadcasting" regulations, */ suggested the inadequacy of such a public interest ground as a basis for denial of First Amendment rights:

> "The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects..." 47 F. Supp. at 946.

The fact that some restraints, wholly unacceptable in other forms of communication, are tolerated in broadcasting is a function of the scarcity of frequencies. Indeed, this unique characteristic underlies all regulation of broadcasting. **/ The Commission is charged by Congress with insuring that broadcasters operate "in the public interest". But a generalized public interest finding, while perhaps sufficient to support the great majority of regulatory actions, cannot alone justify a restriction on a licensee's First Amendment rights. Congress did "not license the Commission to scan the airwaves for offensive material with

---

*/ National Broadcasting Company v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942) aff'd. 319 U.S. 190 (1943).

**/ See Robinson, Observations on 40 Years of Radio and Television Regulation, 42 Minn. L. Rev. 67 (1967).

no more discriminating a lens than the 'public interest'". */

The Commission's requirement that network or off-network programming be of certain specified types if carried during the "sixth half-hour", plunges the Commission into a new and dangerous area of programming choices which it has heretofore eschewed. In its Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291 (1960), 20 P & F Radio Reg. 1901, the Commission reviewed the extent of its authority in the programming area in detail. Noting that it must determine broadcasters' total programming to be responsive to the public interest, the Commission nevertheless affirmed that to act "upon its own subjective determination of what is or is not a good program...would 'lay a forbidden burden upon the exercise of liberty protected by the Constitution.'" Commission En Banc Programming Inquiry, 20 P & F Radio Reg. at 1907 (1960) citing Cantwell v. Connecticut, 310 U.S. 296, 307 (1940). **/

---

*/ Banzhaf v. FCC, 405 F.2d 1082, 1099 (D.C. Cir. 1968) cert. den. 396 U.S. 842 (1969).

**/ The pitfalls of Commission programming judgments were highlighted by Commissioner Loeinger in his dissenting opinion in In re Lee Roy Mc Courry, 2 P & F Radio Reg. 2d 859, 907 (1964) where he observed: "...if the principle is established that the Commission has the right or power to prescribe, either directly or indirectly, the kind and quality of programs that must be carried by broadcast licensees, then the vital interest of society, the nation, and perhaps the world, in the fullest freedom of communications and expressions of ideas, in whatever form, may be compromised."

> "It [The Commission] does not conceive that the manner or extent of the exercise of such responsibility can introduce constitutional or statutory questions. It readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity...". etc. Programming Inquiry, supra, 20 R.R. at 1909 (Emphasis supplied).

Several very recent statements by senior members of the Commission and its staff also indicate the depth of concern for First Amendment freedoms involved here. */

In the Notice of Inquiry and Proposed Rule Making in this very proceeding the Commission noted the "difficult matter...of program quality" and commented:

> "The Commission has traditionally, and wisely, eschewed the role of being a judge of the 'quality' or programming.

---

*/ Chairman Wiley testified before the Senate Appropriations Committee on March 8, 1974. In response to questions by Senator Proxmire concerning Commission efforts with respect to children's programming, Commissioner Wiley first addressed issues dealing with advertising. He then continued: "When you get to the programming aspects of it, of course, you run into additional and more difficult problems, I would say, because you have not only First Amendment considerations but the provisions of the Communications Act, namely 326, which would seem to proscribe the Commission from affecting programming content. So I think we are dealing with very difficult issues." (Transcript, pp. 153, 154). Similarly, John W. Pettit, Esq., who resigned as the Commission's General Counsel March 11, 1974, spoke to this precise point in a speech the following day. Mr. Pettit was quoted by the trade press as saying: "...the recent revision of the prime-time access rule is'a dangerous, dangerous precedent' which 'puts the government in the position of using its judgment concerning the quality of programming.'" See pp. 18-19, supra.

> We therefore have great difficulty in evaluating this aspect of the present matter... We ourselves have not formulated any objective standards for making quality judgements, and do not now perceive the basis for doing so." (Notice, ¶19).

Rather than furthering the First Amendment objectives which prompted and justified adoption of the prime time access rule, */ the challenged modifications represent a shrinking and "partial repeal" **/ of the rule -- a movement away from diversity and toward more network programs. The program types found "worthwhile" by the Commission afford no justification. Requiring one program type at a specific hour obviously forecloses another. But the Government cannot supplant programs in this manner. No matter how desirable network informational and documentary programs are, the Commission cannot command that they be favored over other types of programs during a particular portion of the broadcast day.

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." ***/

---

*/ This Court said in Mt. Mansfield Television, Inc. v. FCC: "...the prime time access rule, far from violating the First Amendment appears to be a reasonable step toward fulfillment of its fundamental precepts." 442 F.2d 470, 477 (2d Cir. 1971).

**/ "...this is in effect a partial repeal of the rule", Report and Order, ¶84, n. 36.

***/ Winters v. New York, 333 U.S. 507, 510 (1948).

Paragraph 83 of the Report and Order sets forth the Commission's reasons for restricting network and off-network programs during the "sixth half-hour". The Commission candidly admits that it has:

> "...rejected the views of numerous parties who asserted that this is impermissible 'quality judgment' of one kind of program as being better than another, making the Commission in effect a 'national program director'." (Report and Order, ¶83).

The Commission admits further that the "worthwhile" nature of the types of programs it fostered (childrens "specials", informational and documentary programs) was "a factor" in its decision. Beyond this the Commission cited three considerations which prompted this particular part of the rule:

1. that it was permissive rather than mandatory;
2. that it related to only one half hour per week; and
3. that it would facilitate the showing of childrens programs at any earlier hour than they are now carried "in the normal course of programming." */

Even if accepted at face value, none of these reasons contain the First Amendment considerations which justify abridgement of license programming freedom.

The argument that the "sixth half-hour" requirement is permissive and therefore proper is both misleading and specious. While "permissive"

---

*/ Report and Order, ¶83.

in the limited sense that the licensee has an option to carry non-network programming -- the fact remains that the requirement effectively limits available program choices. Alternatives are drastically reduced. Coercion and restraint operate on the licensee's decision regardless of the nature of the program he ultimately chooses. If the Commission removes five of ten available program choices it cannot avoid the label of "restraint" by arguing that the license still has five choices left. The limitation is there and it is operative. Furthermore, First Amendment restraints need not always operate directly to be impermissible. Indirect action can have as "chilling" an effect (and perhaps be more insidious) than the frontal assault on First Amendment liberties.

The fact that the restriction "relates to only a half-hour a week" neither minimizes nor justifies it. In the first place, one half hour of prime television time each week, whether measured by its cost to advertisers or the program opportunities it represents, cannot be dismissed as insignificant. More important however is the obvious fact that Constitutional encroachments do not become tolerable because the duration of their impact is "limited".

The Commission's concern with children's programs is commendable, but again, need not and cannot justify prior program restraints. Quite overlooked in the Commission's explanation is the fact that under the

prime time access rule all stations were free to carry off-network children's programs starting at 6:00, 6:30 or 7:00 p.m. Similarly, the networks could have offered such programs to affiliated stations at appropriately early times. No regulatory restraint barred early carriage, only the networks' unwillingness to trade later prime time periods for earlier ones. Earlier children's programs should be secured by an aroused and responsive viewing audience, not by Government fiat.

V. THE COMMISSION FAILED IN THE NOTICE OF INQUIRY AND PROPOSED RULE MAKING AND ELSEWHERE TO PROVIDE ADEQUATE NOTICE OF RULE CHANGES

The Commission's procedure in modifying the access rule deprived Group W and others of their fundamental right to participate meaningfully in the rule making proceeding. This right is guaranteed to interested persons by Section 4 of the Administrative Procedure Act */ which governs the conduct of such proceedings.

The Commission's Notice of Inquiry and Notice of Proposed Rule Making (J.A. 1-33) set forth both proposed changes in the rule and related

---

*/ 5 U.S.C. §553(b)(3) requires that the notice of proposed rule making include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Section 553(c) further requires that: "[T]he agency shall give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments..."

areas of inquiry which were specifically excepted from change at that time. Section C of the Notice provided:

> "This portion of the Notice -- an Inquiry only, with changes along those lines to be adopted, if at all, only after further rule-making proceedings -- is designed to invite comments on some changes in the rule of a more fundamental nature than those mentioned in Subsection B, above." (Notice, ¶51) (Emphasis supplied).

Among the changes of a "more fundamental nature" listed in this section of the notice were:

> "...(2) Imposing certain requirements on stations as to use of the 'access period', e.g., for local programming, children's or "minority group" programs, etc.; (3) exemptions from the rule to encourage the presentation of certain types of material on either a network or 'off-network' basis (children's programs, etc.) and (4) changing the form of the rule so as to specify a definite hour as the 'access period', which might be a later hour than the first hour of prime time which is now generally 'cleared' under the rule as it operates in practice." (Notice, ¶51).

Following enumeration of these areas of inquiry the Commission emphasized that their inclusion did not represent a Commission view that they should be adopted. On the contrary, "...some Commissioners have doubts whether some of them are either realistically feasible or otherwise desirable." (Notice, ¶51)

The order now challenged by petitioners flies in the face of the Commission's assurances to interested persons that changes in the rule of the nature described would be "adopted, if at all, only after further

rule-making proceedings." The heart of the Commission's new modifications lies in changes specifically exempted from adoption in this proceeding. Thus, the access rule as now modified specifies a definite time period as the "access period" and also contains an exemption of one half hour weekly to encourage the presentation of certain types of network or off-network material (children's programs. documentaries, etc). Furthermore, while the rule itself does not impose a specific programming requirement on stations, the Report and Order (¶88) advises affected licensees that they are "expected" to use "some" of the five or six cleared half-hours for minority affairs, children's programming, etc. These changes are precisely the ones the Commission stated would not be made in this proceeding.

We concede that administrative agencies have been accorded some latitude in this area. In general, a notice of proposed rule making is found sufficient if it provides a description of the subjects and issues involved. */

---

*/ California Citizens Band Association v. United States, 375 F.2d 43 (9th Cir. 1967) cert. den. 389 U.S. 844 (1967). In Buckeye Cablevision, Inc. v. Federal Communications Commission, 387 F.2d 220, 226 (D.C. Cir. 1967) the Commission was upheld in a situation where it adopted a rule change after stating in its notice that "in all likelihood" it would "afford an opportunity for comment" but then failed to do so. The important point there was the additional statement in the notice that the Commission desired full comment "in order to be in a position to take any rule-making action found appropriate at the conclusion of this proceeding." 387 F.2d at 226, n. 27.

But the Commission cannot extend administrative latitude to the point where it acts in direct contravention of its notices and orders. To permit such outright disregard by agencies of prior assurances would render the notice requirement meaningless.

Here, the Commission's statement that rule changes of the type ultimately adopted would have to await "further proceedings" served to misdirect the thrust and emphasis of the comments of many of the parties. Clearly, the major concern of participants' comments was with those proposals which had some likelihood of adoption according to the Commission. For the most part the comments of the parties either ignored the inquiry points (as did Group W, on the assumption there would be a future opportunity if such changes were ever seriously considered) or relegated them to relatively minor treatment. */

The Commission suggested in the course of oral argument on petitioner's Motion for Stay that because the Notice cited the possibility of outright repeal of the access rule, any changes short of that -- including those adopted -- were a fortiori the subject of adequate notice. Such reasoning, we submit, would justify the cardiac surgeon telling his patient after the operation that he had adequate notice his leg might be amputated.

---

*/ For example, the comments of CBS, Inc. numbered forty pages, of which seven were devoted to the inquiry points.

CONCLUSION

Notwithstanding protestations that the challenged modifications are minimal in nature, the Commission has effectively scrapped the prime time access rule. In the process, short shrift was given to the public interest considerations the rule was designed to further. Indeed, it could not have been otherwise because the Commission itself realized experience with the rule was too brief to substantiate significant conclusions. In trying to maintain some vestige of program diversity while mollifying the "major" producers, the Commission has stumbled into a thicket well beyond established constitutional boundaries.

For the reasons set forth above, this Court should declare unlawful and set aside the Order modifying Section 73.658(k) of the Commission's Rules and Regulations.

Respectfully submitted,

John D. Lane

J. Carter McKaig

Ramsey L. Woodworth

Hedrick and Lane
1211 Connecticut Avenue, N.W.
Washington, D. C. 20036
(202) 628-5923

Counsel for Westinghouse Broadcasting Company, Inc.

March 21, 1974

APPENDIX A

Effective September 1, 1974, paragraph (k) of Section 73.658, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Evening programming requirements. The provisions of this paragraph apply to stations in the top-50 U.S. television markets (see NOTE below) which are regular affiliates of, or commonly owned with one of the three national television networks (as defined in paragraph (j) of this section), with respect to their evening programming starting on the date between September 1 and October 1, 1974, which their network designates as the start of its "new season".

(1) After such date in September 1974, each station shall devote not less than six (6) half-hours between 7:30 p.m. and 8:00 p.m. E.T. and P.T. (6:30 and 7:00 p.m. CT and MT) Monday through Saturday to programs which are not network, off-network or feature film; Provided, however, That;

(i) one (1) of these six (6) half-hours each week may consist of children's specials, documentaries or public affairs programming, either network originated or off-network.

(ii) "Documentary" programming means any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants.

(2) The following types of material are not considered "network programming" for purposes of this paragraph, so that they may be presented without limitation during the Monday-Saturday time periods mentioned in subparagraph (1) hereof:

(i) "Runovers" of sports events carried on the network during late afternoon or early evening hours, if the telecast of the event (and accompanying pre-game and post-game material, if any) is scheduled so that in the normal course it would be concluded by 7:00 p.m., ET.

(ii) For stations in the Mountain and Pacific time zones, the "live" broadcast of any "simultaneous" network programming, such as sports events or some other special events, which are broadcast simultaneously throughout the 48 contiguous states; provided the network's schedule for the evening including such telecasts complies with the provisions of this paragraph with respect to stations in the Eastern and Central time zones.

(iii) Telecasts of an international sports event such as the summer or winter Olympic games, New Year's Day college football games, or any other network programing of a "special" nature other than sports events or motion pictures, when the network devotes all of its time after 8 p.m. E.T. or P.T. (7 p.m. C.T. or M.T.) the same evening to the same programing, or all of it except brief incidental "fill" material.

(iv) "Pre-game shows" in connection with important sports events carried by the networks (e.g., the World Series), on no more than five occasions per broadcast year.

(v) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or programing related to such events, and political broadcasts by or on behalf of legally qualified candidates for public office.

(vi) Material carried on a commercial or other network other than the three national networks as defined in paragraph (j) of this section.

(3) For those portions of the Eastern and Central time zones where "daylight saving time" is not observed for part or all of the year, during the portion of the year when it is not observed, the times which must be "cleared" of network, off-network and other feature film material shall be one hour earlier than those specified in subparagraph (1) of this paragraph, except for stations which regularly delay network evening programs and rebroadcast them an hour later.

NOTE: For the purpose of this paragraph, the "top 50 U.S. television markets" are the 50 largest markets, in terms of average prime-time households, listed each year by the American Research Bureau (ARB) in its publication Television Market Analysis. Shortly after this publication is issued, the Commission will issue a public notice setting forth the top 50 markets as indicated in that publication. This listing will apply for the following "broadcast year", that period of about twelve months starting the following September on a date which each network designates as the beginning of its "new season".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTINGHOUSE BROADCASTING COMPANY, INC., Petitioner,	)	
v.	)	Case No. 74-1283
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents,	)	
COLUMBIA BROADCASTING SYSTEM, INC. et al. Intervenors.	)	

CERTIFICATE OF SERVICE

I do hereby certify that the Brief for Petitioner Westinghouse Broadcasting Company, Inc. has been served by United States Mail, first class, postage prepaid, this 21st day of March, 1974, upon the following:

Joseph A. Marino, Esquire
Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

Thomas E. Kauper, Esquire
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C.

Renouf, McKenna & Polivy
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
Counsel for National Association of Independent Television Producers and Distributors

McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for American Broadcasting Companies, Inc.

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
Counsel for Columbia Broadcasting System, Inc.

Hardee, Barovick, Konecky & Braun
300 Park Avenue
New York, New York 10022
Counsel for Time Life Films, Inc.

Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C.
Counsel for MCA, Inc.

Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022
Counsel for Columbia Picture Industries, Inc. and
Warner Bros., Inc.